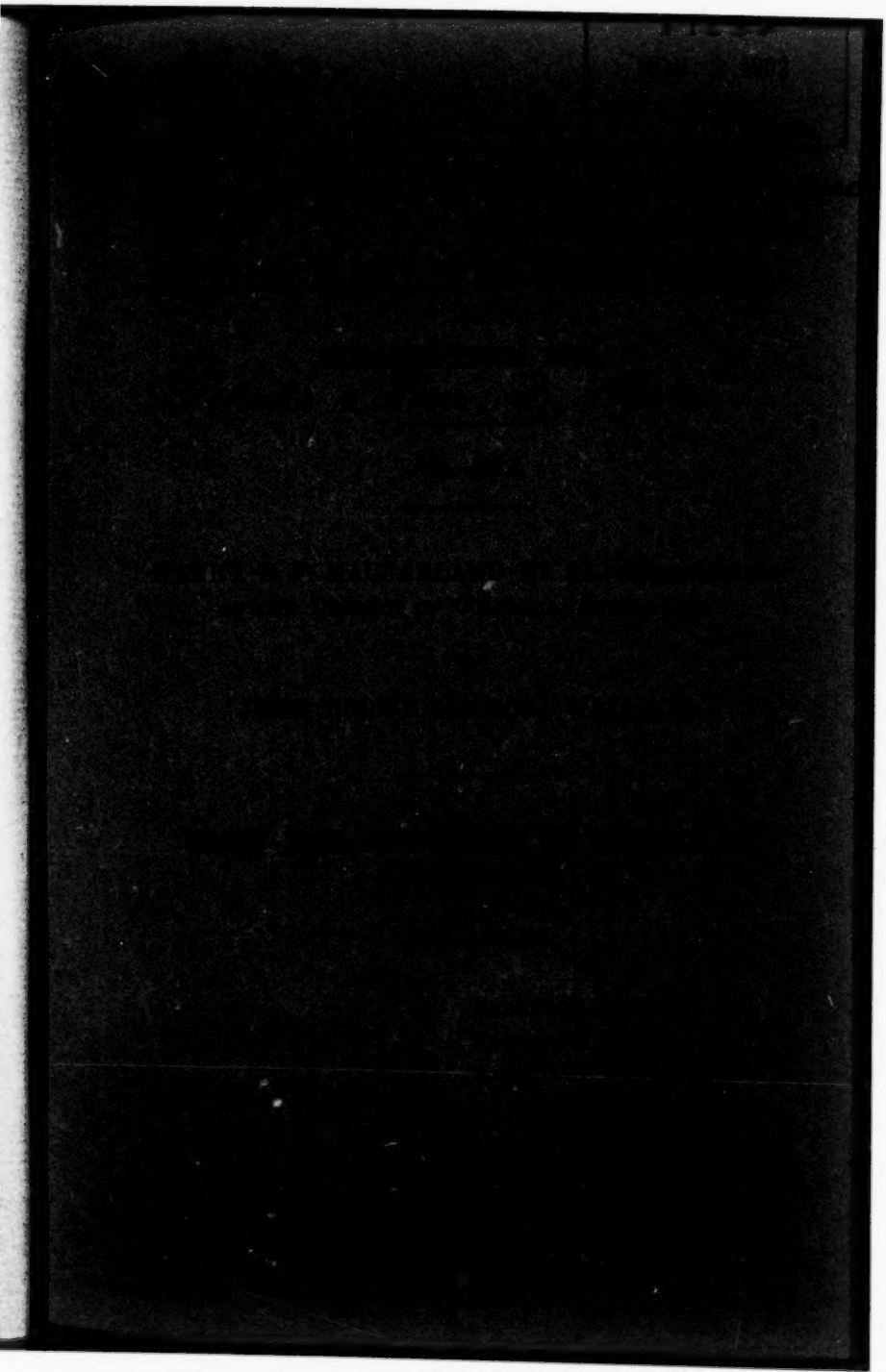

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 331.

HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

BRIEF AND ARGUMENT IN BEHALF OF APPELLANTS.

STATEMENT OF FACTS.

Under the act of Congress entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," approved March 3, 1899 (30 Stat., p. 1381), the Commissioners of the District of Columbia were by the terms of section 5 of said act "authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet." The provisions of said section 5 are as follows:

"SEC. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be,

and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Under the authority thereby conferred a petition was filed by the Commissioners of the District of Columbia in the supreme court of the District of Columbia, sitting as a district court, upon the 31st day of May, 1899, being No. 555 on the District court docket, praying that the court direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by said act of Congress and by chapter XI of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands might be obtained and secured for the aforesaid extension and widening of Sherman avenue (R., p. 1).

Upon this petition the said court on the 16th day of September, 1899, passed an order requiring interested parties to appear in said court on or before the 2d day of October, 1899, and show cause why the prayer of said petition should not be granted, and why the proceedings directed in said act of Congress should not be taken. Pursuant to such order, the jury was summoned and impaneled by the marshal, and upon the 7th day of February, 1900, were sworn according to law, and thereafter the said jury proceeded according to the provisions of chapter XI of the Revised Statutes of the United States relating to the District of Columbia, and having been upon the premises, in accordance with said statute, on the 1st day of May, A. D. 1900, made out their written verdict, which was signed by a majority of the said jurors. Upon the 9th day of May, 1900, the same was filed in the said court under the act of March 3, 1899.

After said verdict was rendered, and before any action was taken thereon by the court, the case of Davidson *et al. vs.* Wight *et al.* came before the Court of Appeals, and, upon the authority of the decision of this court in the case of Norwood *vs.* Baker, the act of March 3, 1899, providing for the extension of S, 22d, and Decatur streets was declared unconstitutional. The act under which Sherman avenue was extended involved the same question, and therefore, pending an appeal of the Davidson case, no action was taken by the trial court in this and other cases involving the same question. In May, 1901, this court, in the case of Wight *et al. vs.* Davidson *et al.* (181 U. S., 371), decided that the act of March 3, 1899, was constitutional, and distinguished its provisions from the Norwood *vs.* Baker case.

Thereafter, on the 3d day of July, 1901, the trial court passed an order *nisi* confirming said verdict and requiring all parties to appear and show cause on or before July 22 why such verdict should not be finally confirmed by the

court. Upon July 22, 1901, the appellees, in response to said order, filed their exceptions to said verdict (R., p. 6).

The court, having heard arguments upon the said exceptions, on October 2, 1901, passed an order overruling the said exceptions and finally ratifying and confirming in all respects the said verdict (R., p. 9).

This was a final judgment and determination of the case, and the appellees appealed the case to the Court of Appeals. The Court of Appeals reversed the trial court, from which decision the Commissioners of the District of Columbia have appealed.

ASSIGNMENT OF ERROR.

The court erred in holding:

1. That the provisions of section 263, Revised Statutes relating to the District of Columbia, providing for a second jury, apply to this proceeding.

2. That appellees had taken the necessary steps to avail themselves of the provisions of said section 263.

3. That the trial court was in error in confirming the verdict of the jury notwithstanding the exceptions thereto.

4. That it was the duty of the Commissioners, and not the duty of the parties claiming to have been dissatisfied with the verdict, to demand a jury of twelve, if a right to such jury exists.

ARGUMENT.

In a series of acts passed in 1899 Congress inaugurated a system of street extensions embracing in three acts the extension of twelve streets. An act entitled "An act to extend S, Decatur, and 22d streets and for other purposes" (30 Stats., 1381) provided for four streets.

An act entitled "An act for the extension of Pennsylvania avenue southeast and for other purposes" (30 Stats., 1344) provided for the extension of seven streets, and an act entitled "An act for the extension of Rhode Island avenue" provided for the twelfth. All of these acts provided, as in the act now before this court, for the assessment of an amount for benefits equal to one-half of the amount awarded for damages.

After the decision of the Court of Appeals in the case of Wight *vs.* Davidson, 16 App. D. C., 371, when the acts above mentioned were deemed unconstitutional by virtue of that decision, a new series of acts was passed not requiring arbitrarily the assessment of one-half the amount for damages, but continuing the same policy by the provision that if the assessments by the jury for benefits did not amount in the aggregate to one-half the sum awarded for damages the Commissioners of the District of Columbia might reject the verdict and annul the proceedings.

Sections 1 to 8, inclusive, of the act of March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast and for other purposes," provide for the institution of proceedings for the condemnation of land for divers streets.

In each case it is provided that the Commissioners of the District of Columbia should institute by a petition in the supreme court of the District of Columbia the proceeding for condemnation, section 5 providing for this proceeding.

Sections 9 to 12, inclusive, and section 14 contain the provisions common to all of the proceedings under that act of Congress.

Those sections are as follows:

"SEC. 9. That the proceedings for the condemnation of the lands as provided for in this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia,

which provide for the condemnation of lands in said District for public highways; and to provide the necessary funds for the cost of such condemnation proceedings the sum of three thousand five hundred dollars is hereby appropriated out of the funds of the District of Columbia: *Provided*, That each juror shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions of this act: *And provided further*, That no appeal by any interested party from any decision of the supreme court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned.

"SEC. 10. That payment of the sum or sums of money adjudged to be due and payable for lands taken under the provisions of this act shall be made by the Treasurer of the United States, *ex officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the said Commissioners, out of the revenues of the District of Columbia; and a sufficient sum to pay such judgments and awards is hereby appropriated out of the revenues of the District of Columbia.

"SEC. 11. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury; and in determining what amount shall be assessed against any particular piece or parcel of ground the jury shall take into consideration the situation of said lots and the benefits that they may receive from the extension of said avenue and highway.

"SEC. 12. That when confirmed by the court the assessments shall severally be a lien upon the land assessed, and shall be collected as special-improvement taxes in the District of Columbia, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made

on or against that part of such lot as is not taken, as is hereinbefore provided.

"SEC. 13. That when the Commissioners of the District of Columbia shall have taken possession of the pieces or parcels of ground in respect to which such judgment condemning the right of way shall have been entered under the provisions of sections one and two of this act, it shall be their duty to cause a roadway of said Pennsylvania avenue southeast, as extended under the provisions herein, of such width and character of construction as in their judgment may be suitable, to be graded and regulated as soon as practicable thereafter.

"SEC. 14. That payment of the awards made in respect of the property condemned shall not be made until the assessments herein provided for shall have been made against the aforesaid property and duly confirmed."

Chapter XI, Revised Statutes of the District of Columbia, provided only for a proceeding before a jury summoned by the marshal upon the application of the proper authorities and did not provide for any proceeding whatever in court. A proceeding, therefore, strictly under chapter XI would be one of which the court had no jurisdiction. The act of March 3, 1899, it will be observed, required the institution of these proceedings by a petition filed in the said court, and the second proviso of its section 9, which refers to a method of proceeding for the condemnation of land, contemplates an appeal by any interested party. There was no provision in chapter XI for assessments of benefits by the jury, but that is provided for by section 5 of the act of March 3, 1899, under which these proceedings were instituted.

All the provisions in the act of 1899 as to assessments are in conflict with chapter XI, Revised Statutes of the District of Columbia, and give a function to the jury never exercised by them under that chapter, and section 12 just quoted, takes away from such jury the duty they had under section 261, Revised Statutes of the District of Columbia, which re-

quires them to "*take into consideration the benefit* such road may be to each owner by enhancing the value of his land, or otherwise," and to "give their verdict accordingly."

By section 12 of the act of 1899 they are expressly prohibited from doing this. The benefit was only to be considered in apportioning the assessment, or, in other words, imposing a tax upon the land within the taxation district provided by section 5 of the act of 1899.

The proceedings necessary in this case, therefore, under the act of March 3, 1899, differed in the following important particulars from the proceeding solely under chapter XI, Revised Statutes of the District of Columbia:

1. This is a proceeding within the jurisdiction and control of the court.

2. The verdict of the jury, so far as assessments are concerned, has to be confirmed by the court.

3. The province of the jury is enlarged by authorizing and requiring them to make assessments by way of taxation.

4. The duties of the jury in assessing damages are changed by prohibiting them from taking into consideration as an offset against such damages any benefits that might accrue to the remainder of any parcel of land, part of which was taken, and in requiring such benefits to be considered in determining what assessment should be made against the part not taken.

5. The act of March 3, 1899, contemplates an appeal from any decision of the supreme court of the District of Columbia confirming such assessments.

6. The act of March 3, 1899, by section 5, fixes a ratio between the damages and assessments, and by section 14

made the payment of the awards dependent upon the confirmation of the assessments.

Chapter XI, Revised Statutes of the District of Columbia, embraces sections 247 to 270, inclusive, but it will not be claimed that any but the following are material:

"SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

"SEC. 253. That the proper authorities shall cause notice to be given, by advertisement twice a week for three weeks, of the proposed opening of the new road, or of the alteration of an existing one, calling upon all persons who may have any objections thereto to present them to such authorities at their next regular meeting, when, if any objections are made, such objections shall be heard.

"SEC. 254. If the route only is objected to, and another suggested as more advantageous, such route may be adopted, or five discreet, disinterested men, of whom the surveyor shall be one, may be appointed to examine all the proposed routes and report such one as they shall deem most feasible and advantageous to the District, and such report shall be made to the authorities at their next meeting.

"SEC. 255. If no objection to opening or altering a road is made by the owners of the land through which it must past, after such notice, it shall be taken for granted that no damages are or will be claimed, and the road may be recorded and opened, and shall then be a public road or highway.

"SEC. 256. The notice required to be given by section two hundred and fifty-three need not be given when all the parties interested are agreed, and all roads laid out under such agreement without notice being given are lawful highways.

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

"SEC. 258. It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury to assess their damages.

"SEC. 259. In cases where the notice cannot be served on the owner and in all cases where the land through which it is proposed to run a road shall belong to a minor or minors, it is presumed that objection is made, and damages shall be assessed accordingly.

"SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

"SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

"SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper authorities at their next meeting, and which shall be recorded.

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the

marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as such.

"SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District.

"SEC. 266. The following fees are payable under the provisions of this chapter: Marshal's fees: For summoning each juror the marshal shall be entitled to fifty cents. For travel, per mile, going and coming to the premises to be examined, twelve and a half cents. For each day's attendance, two dollars and fifty cents. Juror's fees: For each day's attendance, two dollars.

"SEC. 267. In any case where materials of any kind shall be deemed necessary for making or repairing a public road, if the proper authorities cannot agree with the owner as to their purchase, such materials may be condemned in the same manner as provided for in this chapter in cases of condemnation of land for the purposes of a public road.

"SEC. 268. If any person shall alter or in any manner obstruct or encroach on a public road, or cut, destroy, deface, or remove any milestones set up on such road, or place any rubbish, dirt, logs, or make any hole therein, such person may be indicted, and, upon conviction thereof before the proper court, shall be fined or imprisoned in the discretion of the court, according to the nature of the offense.

"SEC. 269. Any person who, without lawful authority, shall obstruct the free use of any of the public highways, which had been used and recognized as public county roads for twenty-five years prior to May third, eighteen hundred and sixty-two, and which were thereafter duly surveyed, recorded, and declared public highways according to law, shall

be subjected to a fine for each offense of not less than one hundred nor more than two hundred and fifty dollars, and be imprisoned till the fine and the costs of suit and collection of the same are paid.

"SEC. 270. The fines provided for in the preceding section shall be collected in the name of the United States for the use of that portion of the District outside of the limits of Washington and Georgetown."

The condition upon which Sherman avenue was to be widened was that the assessment for benefits should equal one-half of the amount awarded for damages. This was the paramount purpose of the act of March 3, 1899.

The primary purpose of the act was that within ninety days after its approval the proceeding should be instituted in court, and, second, but no less important, that of the amount found due and awarded for damages not less than one-half thereof should be assessed *by said jury in said proceedings* against those pieces and parcels of land abutting on both sides of Sherman avenue.

The extension of Sherman avenue, as directed by Congress, was wholly conditional. The extension was not to be made unless the assessment for benefits was at least one-half of the award of damages. This was the fundamental and indispensable foundation of the proceeding. The benefits and damages were thus inseparably yoked together. The equation was required to have and retain these proportionate factors; otherwise Congress declared in effect there should be no extension of Sherman avenue. These appellees accepted the awards of damages for, and they acquiesced in the assessments of benefits against, their other property, and, having done so, they are not at liberty now to destroy the equation which existed when the court confirmed as an entirety the action of the jury.

The claim of the appellees is clearly untenable. Accord-

ing to their claim, it was the right of any one of the owners of the one hundred and fifty pieces of land condemned for the extension of Sherman avenue, upon his mere expression of dissatisfaction with the award of damages, to set aside the entire work of the jury. For to grant the second jury as to one such owner necessarily destroys the essential elements of proportionate equality as between the damages and assessments, and leaves uncertain the ultimate condition upon which alone the extension is to be allowed. If these appellees have a right, as claimed, to a second jury, then each of the owners of the remaining one hundred and forty-nine pieces of land condemned for the extension of Sherman avenue has such right, and each such owner *toties quoties* could, upon mere demand, have each successive verdict set aside, and it would be impossible to reach a final verdict, and thus the extension directed by Congress would be prevented and practically defeated. To say that the law can be so construed is to impute to Congress an utterly absurd purpose and intent in dealing with this most important public matter.

In Wight *et al.*, Commissioners, *vs.* Davidson *et al.* (181 U. S., 371), this court was called upon to construe the act of Congress, approved March 3, 1899, "to extend 'S' street in the District of Columbia." The terms of that act are almost identical with the act under consideration; its general features are the same. It requires the jury to assess as and for benefits one-half of the amount awarded as damages. Section 5 provided:

"That the proceedings for the condemnation of said lands * * * shall be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways."

This is a reproduction *in totidem verbis* of section 9 of the act for widening Sherman avenue.

The proceedings in that case were identical with the case at bar. The jury of condemnation filed its verdict, award, and assessment. Exceptions were filed by the appellees, claiming that the act of Congress was unconstitutional and void, and because "the award of damages and finding of the jury in that behalf are excessive, unjust, and unreasonable. These respondents therefore, each and severally, request and demand said award and finding to be set aside, and that a new jury be impaneled in accordance with the provisions of the statute in such case made and provided."

Mr. Justice Shiras, delivering the opinion of this court, reversing the judgment of the Court of Appeals, said:

"Upon the authorities heretofore cited it would therefore appear that the act of Congress of March 3, 1899, was a valid enactment, and *that the proceedings thereunder were regular*, and constituted due process of law, unless reasons for a different conclusion can be found in the opinion of the Court of Appeals, which reversed the decree of the supreme court of the District, and ordered the dismissal of the petition."

The opinion of the Court of Appeals is then discussed, and the erroneous view of the statute taken by that court as to the constitutionality of the act of Congress and the proceedings had thereunder is shown and declared.

The exceptions filed in the case at bar are not as specific in respect to the claim of a second jury as in that case; there the exceptants *requested and demanded "that a new jury be impaneled in accordance with the provisions of the statute;"* here the exceptants (Rec., p. 6) complained of excessive and unjust assessments, and concluded as follows (Rec., p. 8):

"Wherefore, for the reasons hereinbefore stated, these exceptants pray that *said verdict*, award, and assessment be *not confirmed by this honorable court*, but that the same be vacated, set aside, and nothing held."

Construing the act of Congress granting land to the Union Pacific Railroad Company, this court said:

"If, as we think it manifest, the leading primary policy of the act was to place the lands in the hands of the company to be used for the completion of the road, as this work progressed, any secondary policy the Government may also have had in view ought not to be allowed to embarrass or defeat that which was primary. It is evident Congress thought there might be remnants of the grant, not used in aid of the construction of the road, either because other resources of the company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid, and those remnants it undertook to open to settlement and pre-emption. This appears to us to have been what was intended, and all that was intended. The construction gives full effect alike to the paramount and the subordinate purposes of the act. Each has its own field of operation. The construction contended for by the appellant restricts the power of disposition, denies the authority of the company to utilize, except partially, for the purposes of the grant, the land granted, and might have impaired and possibly defeated the leading purpose of the grant. It subjects the paramount to the subordinate, and postpones the primary object to the secondary. He has, therefore, no equitable title to it."

Platt *vs.* Union Pacific R. R., 99 U. S., at p. 65.

As was said by this court in Luxton *vs.* North River Bridge Company (147 U. S., 337):

"This direction that the proceedings in the circuit court of the United States shall 'conform as nearly as may be to the practice in the courts of the State' must, of course, like the corresponding direction as to practice, pleadings and procedure in section 914 of the Revised Statutes, give way whenever to adopt the State practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of Congress (Indianapolis & St. L. R. Co. *vs.* Horst, 93 U. S. 291; *Re* Chateaugay Ore & I Co., 128 U. S. 544; Southern Pacific R. Co. *vs.* Denton, 146 U. S. 202)."

When there are two acts relating to the same subject, effect is to be given to both if that be practicable. If the two are repugnant the latter will operate as a repeal of the former.

Chi., M. & St. P. R'y *vs.* U. S., 127 U. S., 406.

"Resort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the WHOLE SYSTEM, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent."

Kohlsaat *et al. vs.* Murphy, 96 U. S., 153.

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

The Lessee of Henry Brewer *vs.* Blougher, 14 Peters, 178.

In the case of The Washington Market Company *vs.* James A. Hoffman (101 U. S., 112) the question before the court was the construction of the charter of the Washington Market Company, an act of Congress approved May 20, 1870.

One part of the act provided that the company should offer the stalls in the market "for sale at public auction for one or more years to the highest bidder or bidders," and that "the stalls, stands, and privileges of all kinds in said market, to be used for market purposes when offered for public sale, shall be let to the highest bidder."

Under this provision the market company let to James A. Hoffman, the appellee, one of the stalls in the market for the definite period of two years.

Another provision in the charter was as follows:

"And the person who shall offer the highest price at or beyond said minimum for any such stand, stall, or privilege shall be entitled to the occupation thereof, and shall be considered as having the good will and the right to retain the possession thereof so long as he chooses to occupy the same for his own business and pay the rent thereof."

It was claimed by Hoffman that under this last-quoted clause he had the right to continue in possession of the stall after the expiration of the two years.

In the opinion delivered in this case this court said:

"To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to legislate. In Brewer *vs.* Blougher, 14 Pet. 178, it was said to be the undoubted duty of the court to ascertain the meaning of the legislature from words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it. Now, the subject upon which Congress attempted by this clause to legislate was the rights for the highest bidders for a stall, under a purchase for a term of years, and not the rights of a purchaser under a bid for an indefinite period, terminable only at his will. Nothing else was in view of the legislature. No other sale had been spoken of. The enactment, therefore, that he should have the good will and possession of the stall so long as he might choose to occupy it, paying the rent, must have reference to possession during the term, for that was the only point under consideration. Such a construction of the clause gives effect to it, denies effect to no other words or provisions in the statute, and is in strict harmony with every part. It is the only construction that harmonizes all the provisions of the act."

And this court held in that case that the purchaser of the right to sell in the market under that act of Congress acquired no right beyond the term of years for which the sale was made.

"There is no better way of discovering the true meaning of the law, when there are expressions in it which are rendered ambiguous by connection with other clauses, than by construing the necessity for it and the causes which induced the legislature to pass it" (Heydenfeldt *vs.* Daney Mining Co., 93 U. S., 634).

"If the literal interpretation of any part of it would operate unjustly, or lead to absurd results, and be contrary to the evident meaning of the act taken as a whole, it will be rejected" (Heydenfeldt *vs.* Daney Mining Co., 93 U. S., 634).

In the above case this court construed the following provision in the Nevada enabling act, approved March 21, 1864. The seventh section of that act is as follows:

"That sections number sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section and as contiguous as may be, shall be and are hereby granted to said State for the support of common schools."

It was contended that the terms of this provision constituted a grant *in presenti*, and that the exception contained therein could not apply to any sale of lands by the Government subsequent to the act under the mineral-land laws. Considering the condition of things existing at the time of the passage of the act, and that no sales had been made by the Government prior to the act; that Congress was fully advised of the condition of a new community like Nevada and of all antecedent legislation upon the subject of the public lands, this court held that a sale of all land embraced in one

of the sections described in the mineral-land laws, and subsequent to the passage of the enabling act, excluded such lands from the operation of the act.

"It is well settled that where the language of the statute is in any manner ambiguous, or the meaning doubtful, resort may be had to surrounding circumstances, the history of the times, or the defect or mischief which the statute was intended to remedy" (Smith *vs.* Townsend, 148 U. S., 49).

Rules for the construction of statutes look to the whole and every part of a statute, to the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law.

Washington Market Co. *vs.* Hoffman, 101 U. S., 112.
Hydenfeldt *vs.* Daney, etc., Mining Co., 93 U. S., 634.
Neal *vs.* Scruggs, 95 U. S., 704.
Kohlsaat *vs.* Murphy, 96 U. S., 153.

It was not the duty nor within the power of the Commissioners to order a second jury.

In the opinion of the Court of Appeals rendered in this case it is stated that it is the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to cause the second jury to be summoned and not the duty of the dissatisfied owner, and it is said that all affirmative acts prescribed by the statute (referring to chapter XI, R. S. D. C.) in perfecting the proceeding must be shown to be complied with by the parties authorized to take and prosecute the proceedings.

It will be observed that many of the preliminary proceedings required by chapter XI are obviated by the act of March 3, 1899, which determines the necessity of the taking of the land for the widening of the road, and substitutes a proceeding in court for the proceeding contemplated in chapter XI.

Under an act of the legislature of Massachusetts a proceeding was authorized for the taking of land by the Eastern Railroad Company. The act authorized the court to appoint commissioners to assess damages, and also provided that all general laws relating to the taking of land for railroad purposes should be applicable to and govern the proceedings in the taking of land under that act. By the general laws referred to damages occasioned by taking land by a railroad were to be estimated in the first instance by county commissioners, and "either party, if dissatisfied with the estimate made by the commissioners, may, at any time within one year after it is completed and returned, apply for a jury to assess the damages."

The supreme court of Massachusetts, construing that act, by Gray, C. J., said:

"Under those laws, the estimate of the commissioners being returnable before themselves, the application for a jury is of course to be made to them, and the jury to be ordered by them is a sheriff's jury, whose verdict is certified to the superior court. (See Gen. Sts., c. 43, §§ 19 & *seq.*) The alternative allowed by the st. of 1873, c. 261, of a trial by jury at the bar of the superior court, is limited to cases in which it is provided by law that a sheriff's jury may be had.

"The statute now before us imposes the duty of adjudicating the damages, which ordinarily rests with the county commissioners, upon commissioners to be appointed by this court, and enacts that from their decision 'an appeal to a jury shall lie' in behalf of the land-owner. It contains no provision as to the return or recording of the award of these commissioners, and does not specify in what tribunal the application for a jury shall be made or the trial by jury had. But it is settled, by repeated decisions, that commissioners appointed by this court and deriving all their powers from their judicial appointment must, by necessary implication, without any express statute direction, return their award to the court which appoints them,

to be there examined, and, if no sufficient cause to the contrary is shown, confirmed and recorded (Charles River Mills *vs.* Mill Creek Mills, 7 Pick., 207; Boston & W. R. *vs.* Western R. R., 14 Gray, 253; Hingham & Quincy Bridge *vs.* Norfolk, 6 Allen, 353, 356; New London R. *vs.* Boston & A. R. R., 102 Mass., 386, 388; case of Supervisors of Elections, 114 Mass., 247; Brayton *vs.* Fall River, 124 Mass. 95). The jury is therefore to be applied for after the award of the commissioners has been returned into and accepted by this court, and by way of appeal from the award so accepted. The reasonable, if not the necessary, construction of the statute appears to us, to be, that the application for the jury should be made and the trial had at the bar of this court, in which the whole record of the case from the beginning remains, rather than that the legislature should be presumed to have intended that a proceeding in the nature of an appeal should lie from a judgment of the highest court of the Commonwealth to an inferior tribunal.

"The construction of the statute avoids the grave constitutional difficulties attendant upon holding that the legislature meant, either to confer upon this court the duty of appointing independent officers who do not aid in the performance of its own duties, and whose proceedings are not returned to it or subject to its direct control or revision, or else to allow an application, in the nature of an appeal from a judgment of this court, to the county commissioners.

"The course of legislation and decision in other like cases affords no sufficient grounds to control our conclusions."

Wyman *vs.* Eastern R'y Co., 128 Mass., 346.

The impaneling of a second jury of twelve is the grant of a privilege; it is therefore to be strictly construed and a party claiming the privilege is required to directly claim it and to strictly follow its terms and provisions.

This court in Hannibal & St. J. R. R. Co. *vs.* Missouri R. P. Co., 125 U. S., 260, said:

"But if there be any doubt as to the proper construction of this statute (and we think there is none) then that con-

struction must be adopted which is most advantageous to the interests of the Government. The statute, being a grant of a privilege, must be construed most strongly in favor of the grantor."

Gildart *vs.* Gladstone, 12 East, 668; Charles River Bridge Co. *vs.* Warren Bridge Co., 36 U. S. (11 Pet.), 554; Dubuque & P. R. R. Co. *vs.* Litchfield, 64 U. S. (23 How.), 66; Rice *vs.* Minnesota & N. W. R. R. Co., 66 U. S. (1 Black), 380; Leavenworth L. & G. R. R. Co. *vs.* U. S., 92 U. S., 733; Northwestern Fertilizing Co. *vs.* Hyde Park, 97 U. S., 660.

The filing of exceptions to the verdict and award by the appellees was a waiver of the right to a second jury, if any such right existed. The pretense of a claim of request and demand for a second jury under chapter XI was made for the first time by appellees in their brief in the Court of Appeals.

As was said by this court in Dundee Mortgage & Inv. Co. *vs.* Hughes, 124 U. S., 157:

"As there was in this case no written consent to the order for a trial by referee, it would have been error in the court, if objection had been made, to proceed with a new trial of the case after the report was set aside, without a stipulation in writing waiving a jury, as provided by section 649 of the Revised Statutes (of Oregon); but no such objection was made, and the court proceeded, evidently in accordance with the understanding of the parties, to make new findings, precisely as it would if the order of reference had been actually under the code upon a consent in writing. No exception was taken to this procee ling in the court below, and it is too late to make it here for the first time."

In a condemnation proceeding in Dakota it was held that—

"two courses are left open to a dissatisfied party. He may except to the report, and thereby raise all questions of law as to its legality and insufficiency; or he may demand a jury trial, in which event his damages shall be assessed by

a jury through a regular trial in court. But it was never contemplated that both should be used at the same time or that the latter included the former. When exceptions are filed it is the report of the commissioners that is to be tested. It may be affirmed, modified or rejected and a new appraisement may be ordered. Necessarily this is done by the court and there is no place in the proceeding for a jury. On the other hand when a jury trial is demanded the whole matter of compensation is in the jury's hands."

Minn., St. P., etc., R'y *vs.* Nester, 3 N. Dak., 480.

"A land-owner who has been awarded damages for the appropriation of his land for a public road and who has had his day in court, on exceptions to the award has no standing to petition the court for a jury to assess his damages."

In re West Whiteland Rd., 4 Pa. Co. Ct. R., 511.

"Exceptions to the report of viewers and an appeal for trial by jury cannot in condemnation proceedings be both taken and insisted on at the same time, but the court will compel the municipality to elect on which it will rely."

Bechtel *vs.* Borough of Bechtelville (Com. Pl.), 3 Pa. Dist. R., 713.

The laws of Massachusetts provide that a party who is dissatisfied with the estimate made by the county commissioners of the damages caused by taking land for a railroad company "may apply for a jury to assess the damages either at the same meeting at which such estimates shall be completed and returned or at the next regular meeting therefor."

It was held by the supreme court of Massachusetts, construing this statute, that where a party applied for a jury at the same meeting at which the estimate is completed and recorded, and then failed to pursue his remedy, that he could not by merely omitting or refusing to proceed, entitle himself to a jury by applying therefor at the next regular meeting of the commissioners. Although he had the absolute right

under the statute to apply at the next regular meeting, it was held that by his action he had waived that right.

Taylor *vs.* County Commissioners of Plymouth, 13 Metc., 449.

Under a similar statute, in the same State, a party whose land was taken for a road was granted the right to apply for a jury to revise the judgment of the county commissioners in the assessment of damages within a specified time. Where the petitioners delayed proceedings under the petition for a jury in the belief derived from conversations with some of the county commissioners that some action would be taken with reference to a verbal application made for the relocation of the highway, and then after the time prescribed by the statute applied for a jury, it was held that he had waived his right. The opinion of the court contains the following expression:

"The petitioner's right to a jury was a right which he might waive and abandon, and which must be taken to have been abandoned if the statutory requirement is not complied with."

Thorndyke *vs.* County Commissioners of Norfolk, 117 Mass., 566.

Construing the same statute, the supreme court of Massachusetts held, in the case of a condemnation proceeding in behalf of a railroad corporation, that where the county commissioners had assessed the damages for the taking of land and the railroad company had applied, under the statute, for a jury to assess the damages, and thereafter had discontinued its petition for the jury and accepted the award of the commissioners, that the owner of the land, not having himself filed a petition for a jury, could not insist upon a trial by jury without having asserted the right as required by the statute. The court, by Gray, C. J., said:

"A petition for a jury is not strictly an appeal and does not affect the award of the commissioners. The petitioner had the right at any stage of the proceedings, and upon such terms as the court should order, to waive a trial by jury, and accept the award of the commissioners" (Fall River R. R. Co. *vs.* Chase, 125 Mass., 483).

If the owner accepts the damages awarded he cannot object to the report, either on account of the amount awarded or on any other ground.

Lewis on Eminent Domain, sec. 531.

In Re Application of Woolsey, 95 N. Y., 135.

After receiving damages parties cannot be heard against the validity of the proceedings or appeal from the same, although they may be in fact erroneous.

Mills' Eminent Domain, § 329.

Miss. R. R. *vs.* Byington, 14 Iowa, 572.

Embury *vs.* Connor, 3 N. Y., 511.

Town *vs.* Blackberry, 29 Ill., 137.

Karber *vs.* Nellis, 22 Wis., 215.

Kile *vs.* Yellowhead, 80 Ill., 208.

Chatterton *vs.* Parrott, 46 Mich., 432.

It is respectfully submitted that the Court of Appeals was in error, as herein specified, and that the judgment of that court should be reversed.

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